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IN THE
Supreme Court of the United States
OCTOBER TERM, 1938.

No. 465.

ROBERT B. HONEYMAN,
Appellant,
against

ALMA CLAIRE CLARK, individually and as Executrix under the Last Will and Testament of ANNIE E. POTH, deceased, and others,
Respondents,
and

DAVID B. JACOBS and MARY V. JACOBS, his wife,
Appellees.

APPELLANT'S BRIEF

ROBERT B. HONEYMAN,
Attorney for Appellant.

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APPELLANT'S BRIEF.

Opinions of Courts Below.

The opinion of the New York Court of Appeals on its affirmance of the final order of the Special Term of the Supreme Court is reported in 278 N. Y. 467. It will be found in the Record (p. 31).

The appeal to the New York Court of Appeals was taken directly from the determination of the Special Term of the New York Supreme Court under the provisions of subdivision 3 of Section 588 of the Civil Practice Act. The memorandum of opinion of the Supreme Court, Special Term, is not reported so far as we can find except in the New York Law Journal of June 23, 1938. It is printed in the Record (p. 27).

Jurisdiction.

The appellant filed a statement as to the jurisdiction as part of the papers presented to the Chief Judge of the Court of Appeals upon the allowance of the appeal, which statement has been printed and submitted to this Court. Upon preliminary consideration of the matter of jurisdiction we are advised that this Court has noted "probable jurisdiction."

In any further consideration of the subject, may we call attention to the fact that the judgment of the New York Court of Appeals is based upon the jurisdiction conferred upon it by Section 588 of the Civil Practice Act, subdivision 3, reading as follows: An appeal may be taken to the Court of Appeals

"as of right, from a judgment or order of a court of record of original jurisdiction which finally determines an action or special proceeding where the only question involved on the appeal is the validity of a statutory provision of the state or of the United States under the constitution of the state or of the United States; and on any such appeal only the constitutional question shall be considered and determined by the court."

In this case, the appeal was taken under that provision. There could be no question before the Court of Appeals save only the constitutionality of Section 1083-a of the Civil Practice Act, added by Laws of 1933, Chapter 793, under Section 10, Article 1, of the Constitution of the United States.

Statement of the Case.

This action was brought to foreclose a mortgage upon real property in Queens County, New York, executed and delivered by the appellees, David B. Jacobs and Mary V. Jacobs, on the 4th day of February, 1928, to secure the payment of their bond in the sum of \$15,000.

The complaint (Record, pp. 11-17) asks for a judgment of foreclosure and sale of the mortgaged premises and for a judgment for any deficiency which might arise upon the sale. The summons and complaint were served upon the appellees and they duly appeared in the action by their attorneys. Judgment of foreclosure and sale was entered on or about April 21, 1938, and the mortgaged premises were sold thereunder, after due public notice, on May 19, 1938, and were bid in by the appellant for the sum of \$7,500, in all respects as permitted by law and by the said judgment of foreclosure and sale (fol. 26). Thereafter, the Referee duly appointed to make the sale made his report of sale and reported that, after the payment of taxes and expenses, "there was due to the plaintiff a deficiency of Nine Thousand Five Hundred Ninety and 20/100 Dollars, with interest from the date of his report."

Up to this time the appellees did not question in any manner any of the proceedings taken by the appellant, nor did they oppose the same. Under the statutes as they existed at the time the bond and mortgage were executed, the entry of a deficiency judgment upon the confirmation of the Referee's report would follow, as a matter of course, for the amount stated by the Referee as a mere clerical act (*Feiber Realty Corp. v. Abel*, 265 N. Y. 94, citing *Morris v. Morone*, 38 N. Y. 172), and as is stated in the opinion of the Court of Appeals.

Sections 1083-a and 1083-b of the Civil Practice Act, enacted by Chapter 794 of the Laws of 1933, purport to limit the right of a mortgagee plaintiff to enter a deficiency judgment. Recognizing the propriety of these acts in so far only as they require an application to be made to the Court to direct the entry of a deficiency judgment, the appellant, under Section 1083-a, applied for an order confirming the sale and for leave to enter a deficiency judgment upon notice to the appellees (p. 4). In his moving papers, the appellant alleged (fol. 9) that "under and in accordance with the law of his contract" with the appellees, he was entitled to a judgment against them in the sum of \$9,590; and he further alleged (p. 7, fol. 9)

"that by the laws of 1933, Chapter 794, and various other acts supplemental and amendatory thereto, the legislature of the State of New York has attempted to limit deficiency judgments in foreclosure by inserting in the Civil Practice Act new sections known as 1083-a and 1083-b. That such legislative acts constitute an unreasonable interference of the plaintiff's contract rights with the defendants David B. Jacobs and Mary V. Jacobs, and are wholly unconstitutional and in violation of Article 1, Section 10, of the Constitution of the United States";

and plaintiff asked the Court for an order confirming the Referee's report of sale (p. 7) and directing the Clerk to enter judgment in favor of the appellant for the deficiency shown by the Referee's report. The appellees filed affidavits in opposition to the motion setting forth their views as to the value of the property (fols. 35-38). The Court at Special Term handed down its memorandum, which appeared in the New York Law Journal on June 22, 1938, as follows (p. 27, fol. 40):

"Lockwood, J. Application to enter a deficiency judgment for \$9,590, the full amount due, not pursuant to the provisions of the Civil Practice Act, section 1083 et seq., but upon the theory that such sections are unconstitutional as violative of section 10, article 1, of the Constitution of the United States. In view of the decision of the Court of Appeals (*Honeyman v. Hanan*, 275 N. Y. 382; *Klinke v. Samuels*, 264 N. Y. 144; *City Bank Farmers' Trust Co. v. Ardlea Corp'n*, 267 N. Y. 224), it is vain to present this contention at Special Term. Motion denied."

Thereafter the order of the Special Term (fols. 3, 4, 5) was entered confirming the Referee's report, and ordering that

"the plaintiff's application for a deficiency judgment against the defendants David B. Jacobs and Mary V. Jacobs in the sum of Nine Thousand Five Hundred and Ninety (\$9,590.00) Dollars, being the amount of deficiency as reported by the Referee in his report, or in any other sum, be and the same hereby is in all

respects denied on the grounds that the value of the property is equal to the debt of the plaintiff, and pursuant to Section 1083-a of the Civil Practice Act of the State of New York, limiting deficiency judgments, the plaintiff is deemed paid as a matter of law, which section is hereby held to be constitutional."

It is provided by Section 588 of the Civil Practice Act, subdivision 3, of the State of New York that an appeal may be taken to the Court of Appeals

"as of right, from a judgment or order of a court of record of original jurisdiction which finally determines an action or special proceeding where the only question involved on the appeal is the validity of a statutory provision of the state or of the United States under the constitution of the state or of the United States; and on any such appeal only the constitutional question shall be considered and determined by the court."

The appellant duly appealed to the Court of Appeals from the order of Special Term and the appeal was argued in October, 1938, and thereafter the Court of Appeals handed down its decision affirming the order and upholding the validity and constitutionality of Section 1083-a of the Civil Practice Act. The opinion is printed and annexed to this brief for convenience. It is reported in 278 N. Y. 467.

The appellant applied to the Chief Judge of the Court of Appeals (fol. 47) for leave to appeal to this Court and the application was granted.

Specifications of Assigned Errors to Be Urged.

1. The State Court erred in holding that Section 1083-a of the Civil Practice Act, enacted by the Legislature of the State of New York by Chapter 794 of the Laws of 1933, does not violate the provisions of Article I of Section 10 of the Constitution of the United States.

2. The State Court erred in holding that the Legislature of the State of New York may validly enact that a court of

the State may in foreclosure proceedings determine the value of the mortgaged premises and that the mortgagee must accept such valuation as a credit or payment upon the mortgage debt, which debt was created and existed before the passage of the act of the Legislature.

3. The State Court erred in not holding that Section 1083-a is an unreasonable violation of appellant's contract rights, without any protection of said rights or due consideration thereof and without compensation.

4. Chapter 794 of the Laws of 1933 of the State of New York is a law impairing the obligation of contracts made before the enactment of such law, in that it impairs the rights of the holders of contract obligations secured by mortgage to enforce the same and takes from such creditors their contractual right of enforcement and recovery except to the extent of the limited remedy provided by such statutes, which is a partial remedy only and less in value or extent than the contractual obligation; such impairment of the contractual rights of creditors and of the contractual obligation of debtors is in contravention of the provisions of Article I, Section 10, of the Constitution of the United States that no State shall pass any law impairing the obligation of contracts, and the State Court erred in holding that such statute was a valid exercise of legislative power by the State of New York and available to defeat appellant's recovery of judgment in accordance with the contract obligation.

ARGUMENT.

In 1933 the Legislature of the State of New York made some radical changes with respect to foreclosure of mortgages and actions on mortgage bonds. By Chapter 793 of the Laws of 1933, it enacted that during the period of a declared emergency and "notwithstanding any inconsistent provisions of the Civil Practice Act or any other general or special law, or of any agreement, bond or mortgage, no action or proceeding for the foreclosure of a mortgage upon

real property nor any interest therein, nor any foreclosure under Article 17 of the Real Property Law, shall be maintainable solely for or on account of a default in the payment of the principal secured by such mortgage." Actions on bonds for principal defaults were likewise suspended. Where, however, there was a default in the payment of interest and taxes, foreclosure or action upon the bond could be maintained.

The Legislature, however, went further than merely granting a moratorium. It provided by Chapter 794 (printed and annexed to this brief for convenience) a *limitation upon deficiency judgments*. Under Section 1083-a of the Civil Practice Act (which was added by Chapter 794 of the Laws of 1933) it was provided:

"No judgment shall be granted for any residue of the debt remaining unsatisfied as prescribed by the preceding section where an action to foreclose the mortgage has been or shall be commenced during the emergency or where the mortgaged property shall be sold during the emergency, except as herein provided. Simultaneously with the making of a motion for an order confirming the sale, or in any event, within ninety days after the date of the sale, the party to whom such residue shall be owing may make a motion in the action for leave to enter a deficiency judgment upon notice to the party against whom such judgment is sought or the attorney who shall have appeared for such party in such action. Such notice shall be served personally or in such other manner as the court may direct. Upon such motion, whether or not the respondent appears, shall determine, upon affidavit or otherwise as it shall direct, the fair and reasonable market value of the mortgaged premises as of the date such premises were bid in at auction or such nearest earlier date as there shall have been any market value thereof and shall make an order directing the entry of a deficiency judgment. Such deficiency judgment shall be for an amount equal to the sum of the amount owing by the party liable as determined by the judgment with interest, plus the amount owing on all prior liens and encumbrances with interest, plus costs and disbursements of the

action including the referee's fee and disbursements less the market value as determined by the court or the sale price of the property whichever shall be the higher. If no motion for a deficiency judgment shall be made as herein prescribed the proceeds of the sale regardless of amount shall be deemed to be in full satisfaction of the mortgage debt and no right to recover any deficiency in any action or proceeding shall exist.

Let us consider briefly the practical effect of this section upon a mortgagee and his rights under an ordinary mortgage. There must be a default in payment of interest and taxes, otherwise he could not foreclose his mortgage. Having the right to foreclose, because of default in interest or taxes, he necessarily proceeds by "the old and well known remedy of foreclosure"—"the classical method of realization upon mortgage security" and which has "always been understood to be fair to both parties"—and sells the property *under the order and direction of the Court*, and at such sale the property does not bring anywhere near the amount of the mortgage debt. If he does not ask the Court for a deficiency judgment within ninety days, the proceeds of the sale, regardless of the amount, *shall be deemed in full satisfaction of the mortgage debt and no right to recover any deficiency shall exist*. If he does make an application for a deficiency,

he must credit against the amount of his mortgage whatever the Court may determine to be "the fair and reasonable market value of the mortgaged premises." The provisions are not mere temporary provisions, but are permanent so far as the contract rights of the mortgagee are concerned.

The Court of Appeals of the State of New York has held that the right to a deficiency judgment *must* be determined in the foreclosure action (*Honeyman v. Hanan*, 275 N. Y. 382; appeal dismissed; see opinion in *Honeyman v. Hanan*, 82 U. S. Law Ed. 254).

It will be observed that the holder of a mortgage which is in default with interest and taxes accumulating must either forfeit all his rights under his contract or else pro-

ceed in the only method allowed him, and if he does proceed he must take in *full payment* whatever the Court may seem fit to allow *in lieu* of his contract rights.

Until the decision in this case, the New York Court of Appeals has not directly held that the Legislature has power to alter or impair a contract obligation by requiring the satisfaction in full of an admitted debt upon payment of only a part of the amount due and to take that payment in real property.

In *Honeyman v. Hanan*, 275 N. Y. 382 (appeal dismissed, U. S. Supreme Court, Dec. 20, 1937, 82 L. Ed. 254), the Court said:

"In sustaining the validity of the statutes here challenged, we should perhaps state that we are not deciding that the Legislature has power to declare that for every purpose a debt shall be 'deemed' to be satisfied though in fact the debt has not been paid or satisfied in accordance with the instrument which created it. We have given to this provision a limited application. (Cf. *Matter of City of New York* [Neptune Arc.], 271 N. Y. 331; *Cyllene Corp v. Eisen*, 272 N. Y. 526; *Matter of City of New York* [E. 29th St.], 273 N. Y. 62.) We hold only that reasonable limitations and restrictions may be placed upon actions to recover the debt, in order to meet conditions which constitute an imminent danger to the public welfare."

In the *Klinke* case (264 N. Y. 144), the Court said:

"As to the constitutionality of these provisions we must remember that the limitation upon the remedy in both or all instances is until July 1, 1934. There being no market for real estate of any kind, and the banks refusing to loan money on the best of real estate security owners were caught, as it were, in a trap due to conditions over which no one had control and for which no relief was at hand. Value was in the property, but the value could not be obtained nor anything like it. To prevent worse and more extensive evils and suffering the Legislature had asked through these laws for security holders to wait a rea-

sonable time for universal economic conditions to improve, provided interest and taxes are paid.

After next July all remedies, so far as these present laws apply, will again be open to the mortgage creditors.

That such legislation, reasonably seeking only temporary relief, is not unconstitutional, we may refer to our recent decision in *Matter of People* (Title & Mortgage Guarantee Co. of Buffalo) (264 N. Y. 69), and *Home Building & Loan Ass'n v. Blaisdell* (290 U. S. 398)."

In *City Bank v. Ardlea*, the primary question was whether the emergency laws applied to the guaranty in suit, and it was held that it did, and the Court then followed the *Klinke* case as to the constitutional question, which involved only the element of reasonable delay and not an absolute bar to a deficiency judgment.

In the case of *Beaver County Building & Loan Assn. v. Winowich*, 187 Atl. 481, 323 Pa. 483, the Court said:

"Under our constitutional system, however, emergency cannot create a power nor diminish restrictions. *Ex parte Milligan*, 4 Wall. 2, 120, 121, 18 L. Ed. 281; *Wilson v. New*, 243 U. S. 332, 348, 37 S. Ct. 298, 61 L. Ed. 755, L. R. A. 1917E, 938, Ann. Cas. 1918A, 1024; *Home Building & Loan Association v. Blaisdell*, 290 U. S. 398, 425, 426, 54 S. Ct. 231, 235, 78 L. Ed. 413, 88 A. L. R. 1481; *A. L. A. Schechter Poultry Corp. v. United States*, 295 U. S. 495, 528, 529, 55 S. Ct. 837, 842, 79 L. Ed. 1570, 97 A. L. R. 947. A necessity that is higher than the Constitution can have no place in American jurisprudence; it can be met only by constitutional amendment. 'No doctrine,' said the court in *Ex Parte Milligan*, 4 Wall. 2, 121, 18 L. Ed. 281, 'involving more pernicious consequences, was ever invented by the wit of man than that any of its (the constitution's) provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism.'"

Section 1083-a provides that a deficiency judgment may be had *only* by the method therein prescribed, and, in effect, that the proceeds of sale or the amount allowed by the Court as the value "*shall be deemed to be in full satisfaction of the mortgage debt and no right to recover any deficiency in any action or proceeding shall exist.*" This is not merely temporary legislation. It does not secure plaintiff's rights and postpone them to a later date. It does not merely modify a remedy. It *abolishes a right*. He is forced to move for a deficiency judgment and take what the Court allows, and he is penalized if he doesn't move for the deficiency.

Plaintiff was obliged to foreclose. The property had been abandoned by the owner and by those liable on the bond, and interest and taxes were unpaid, but the necessities of the mortgagee are wholly ignored by the Legislature. If now plaintiff acquiesces in the order of the Special Term, his mortgage is "deemed paid" in full.

The Legislative Act Has Impaired Plaintiff's Contract.

Plaintiff's contract was made February 4, 1928 (fol. 46). Judge Cardozo in *W. B. Worthen Co. v. Kavanaugh*, 295 U. S. 638, 640, cited many cases in support of the proposition that "to know the obligation of a contract we look to the laws in force at its making."

See also:

Rutherford v. Clark, 198 N. Y. 29-33;

N. Y. Life Insurance Co. v. Guttay, 265 N. Y. 292, 296.

At the time the contract in suit was made, the docket of a deficiency judgment was merely a clerical act in pursuance of the direction of the judgment entered (*Feiber Realty Co. v. Abel*, 265 N. Y. 94), and was always for the deficiency reported by the Referee to sell. The Legislature could, of course, amend the Practice Act by requiring a special motion and the order of the Court to enter a deficiency judgment, but *it could not require the plaintiff to credit upon the*

contract obligation whatever sum the Court should determine to be the fair value of the property. It might, of course, refuse to confirm the sale and direct a resale, but the Court was required to sell and to credit the net proceeds received by plaintiff *and no more*. Whatever the intrinsic value of the property may be, plaintiff doesn't want it in payment, and his contract doesn't require him to take it at any price the Court sees fit to allow. What right has the Legislature or the Court to say that plaintiff is "deemed to be paid in full"—when concededly he has not been?

The Constitution of the United States states:

"No state shall * * * pass any * * * law impairing the obligations of contract. * * *"
Art. 1, Sec. 10).

In *McCracken v. Hayward*, 2 How. 608 (1844), it is stated (p. 612):

"* * * The obligation of a contract consists in its binding force on the party who makes it. This depends on the laws in existence when it is made; these are necessarily referred to in all contracts, and forming a part of them as the measure of the obligation to perform them by the one party, and the right acquired by the other. * * * If any subsequent law affects to diminish the duty, or to impair the right, it necessarily bears on the obligation of the contract, in favour of one party, to the injury of the other; hence any law, which in its operation amounts to a denial or obstruction of the rights accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the Constitution."

In the case of *Home Bldg. & L. Assn. v. Blaisdell*, 290 U. S. 398 (1934), the Court said (p. 431):

"The obligations of a contract are impaired by a law which renders them invalid, or releases or extinguishes them (*Sturges v. Crowninshield*, 4 Wheat. 122 [1819], pp. 197, 198) and impairment, as above

noted, has been predicated by laws which without destroying contracts derogate from substantial contractual rights."

In *W. B. Worthen Co. v. Thomas*, 292-U S. 426, the Court, referring to the *Blaisdell* case, said (pp. 433-434) :

"In *Home Bldg. & L. Asso. v. Blaisdell* (290 U. S. 434), we held that 'the reserved power of the State must be construed in harmony with the fair intent of the constitutional limitation and that this principle precluded a construction which would permit the State to adopt as its policy the repudiation of debt or the destruction of contracts or the denial of means to enforce them' * * * and 'when the exercise of the reserved power of the State, in order to meet public need because of a pressing public disaster, relates to the enforcement of existing contracts, that action must be limited by reasonable conditions appropriate to the emergency. Accordingly, in the *Blaisdell* case we sustained the Minnesota mortgage moratorium law in the light of the temporary and conditional relief which the legislation granted. We found that relief to be reasonable, *from the standpoint of both mortgagor and mortgagee, and to be limited to the exigency to which the legislation was addressed.*

'In the instant case, the relief sought to be afforded is neither temporary nor conditional. In placing insurance moneys beyond the reach of existing creditors, the Act contains no limitations as to time, amount, circumstances, or need. We find the legislation as here applied to be a clear violation of the constitutional restriction.'" (Italics ours.)

In *W. B. Worthen Co. v. Kavanaugh*, the Court unanimously said :

"Not even changes of the remedy may be pressed so far as to cut down the security of a mortgage, without moderation or reason, or in the spirit of oppression, even when the public welfare is involved as an excuse, their bounds must be respected."

and condemned the Arkansas legislative acts as unconstitutional, distinguishing the *Blaisdell* case.

In *Richmond Mortgage Co. v. Wachovia Bank*, 300 U. S. 127-129, this Court said:

"The legislature may modify, limit or alter the remedy for enforcement of a contract without impairing its obligation, but, in so doing, it may not deny all remedy or so circumscribe the existing remedy with conditions and restrictions as seriously to impair the value of the right. The particular remedy existing at the date of the contract may be altogether abrogated if another equally effective for the enforcement of the obligation remains or is substituted for the one taken away. The matter in dispute is whether the questioned enactment falls beyond the boundary or permissible regulation of the remedy for enforcement of the appellant's contract."

In the case of *Beaver County Building & Loan Assn. v. Winovich*, 323 Pa. 483, 187 Atl. 481, there was under consideration the Pennsylvania Mortgage Deficiency Act (1934), and it was held unconstitutional as to mortgages contracted before its enactment because of the constitutional provision prohibiting the impairment of obligations of contracts. Under the laws of Pennsylvania in effect at the time of the enactment of the statute, a mortgagee was entitled to a deficiency judgment in an amount equal to the amount of the mortgage debt, interest and costs, after deducting therefrom the net proceeds of a foreclosure sale. The Act under consideration provided for a deficiency judgment in an amount fixed by deducting the fair value of the property instead of the proceeds of the foreclosure sale. The Court in a long opinion reviewed many cases and held the Act to be unconstitutional.

To the same effect is the later case of *Knorr v. Migale*, 196 Atl. 18.

In *Sayre v. Duffy*, 13 N. J. Misc. 458, 179 Atl. 459, the New Jersey statute, Chapter 82 of the Laws of 1933, providing that the Court should determine the amount of the deficiency in mortgage foreclosures by deducting from the

amount of the debt the fair market value of the premises, was held to be unconstitutional, the Court saying:

"The effect is not to delay the remedy but to abrogate completely the rights of the mortgagee to a deficiency judgment."

Vanderbilt v. Brunton Piano Co., 111 N. J. L. 596, 169 Atl. 177, likewise holds the New Jersey statute unconstitutional.

Alert B & L Co. v. Bechtold, 199 Atl. 734, holds the amended New Jersey statute likewise unconstitutional.

In *California* the limitation of deficiency judgments to the difference between the debt and the fair market value is held unconstitutional. *Hales v. Snowden*, 65 Pac. (a) 847; *Brown v. Ferdon*, 54 Pac. (2) 712.

In *Arizona* the right to a deficiency judgment is a vested right under the contract and a statute taking it away is unconstitutional. *Kresos v. White*, 54 Pac. (2) 800; *Bontag v. McCurdy*, 59 Pac. (2) 326.

Various State Courts have reached a similar conclusion.

Nebraska—*Stehler v. Krinks*, 277 N. W. 784;

Georgia—*Atlantic Loan v. Paterson*, 181 Ga. 266;

Arkansas—*Adams v. Spilyards*, 68 S. W. (2) 470;

North Dakota—*State v. Klein*, 249 N. W. 118;

Oklahoma—*State v. Waterfield*, 167 O. K. 209;

South Carolina—*Fed. L. Bank v. Garrison*, 193 S. E. 308;

Texas—*Langerer v. Hiller*, 76 So. W. (2) 1025;

Texas Nat. Sec. v. Oldham, 88 So. W. (2) 621;

Bellups v. Central Life, 88 So. W. (2) 735;

Washington—*Strand v. Griffith*, 63 Wash. 334.

Respectfully submitted,

ROBERT B. HONEYMAN,

Attorney for Appellant.

Opinion of the Court of Appeals.

COURT OF APPEALS.

ROBERT B. HONEYMAN,

Appellant,

vs.

**ALMA CLAIRE CLARK, individually, &c., and
others, defendants,**

and

**DAVID B. JACOBS and MARY V. JACOBS,
his wife,**

Respondents.

Per Curiam:

The plaintiff has brought an action for the foreclosure of a mortgage upon real property in Queens County, executed and delivered by the defendants, David B. Jacobs and Mary V. Jacobs, on the 4th day of February, 1928, to secure the payment of their bond in the sum of \$15,000. The plaintiff asks for a judgment of foreclosure and sale of the mortgaged premises and for judgment for any deficiency which may arise upon such sale. Judgment of foreclosure and sale was entered in April, 1938, and the mortgaged premises were sold in May, 1938, to the plaintiff for the sum of \$7,500. The referee reported that after payment of taxes and expenses "there is due to the plaintiff a deficiency of \$9,590.21 with interest from the date of this report." Under the statute as it existed at the time the bond and mortgage were executed, the plaintiff would have been entitled to a judgment for that deficiency.

Sections 1083 a and b of the C. P. A. enacted thereafter purport to limit the right of the plaintiff to enter a deficiency judgment. The plaintiff, alleging "that such legislative acts constitute an unreasonable interference to the plaintiff's contract rights with the defendants, David B. Jacobs and Mary V. Jacobs, and are wholly unconstitutional and in violation of Article 1, Section 10 of the Constitution of the United States," has applied to the court for an order confirming the referee's report of sale and directing the clerk to enter in his favor judgment against the said defendants in the sum of \$9,590. The plaintiff appeals to this court from an order of Special Term which provides that the application for a deficiency judgment "is in all respects denied on the grounds that the value of the property is equal to the debt of the plaintiff, and pursuant to Section 1083-a of the Civil Practice Act of the State of New York, limiting deficiency judgments, the plaintiff is deemed paid as a matter of law, which section is hereby held to be constitutional." The appeal is taken direct to this court pursuant to the provisions of Section 588, subdivision 3, C. P. A., and the only question which may be considered on this appeal is the validity of Section 1083-a under the Constitution of the United States. We have, in other cases, sustained its validity (*Honeyman v. Hanan*, 275 N. Y. 382; *Klinke v. Samuels*, 264 N. Y. 144; *City Bank Farmers Trust Co. v. Ardlea Corp.*, 267 N. Y. 224).

Order affirmed without costs.

Laws of New York of 1933,

"Chapter 794.

"AN ACT to amend the civil practice act, in relation to deficiency judgments in actions to foreclose mortgages on real property and actions to recover judgments on bonds secured by mortgages on real property

"Became a law August 28, 1933, with the approval of the Governor Passed, on message of necessity, three-fifths being present.

"The People of the State of New York, represented in Senate and Assembly, do enact as follows:

"Section 1. It is hereby declared that a serious public emergency affecting and threatening the welfare, comfort and safety of the people of the state and resulting from the abnormal disruption in economic and financial processes, the abnormal credit and currency situation in the state and nation, the abnormal deflation of real property values and the curtailment of incomes by unemployment and other adverse conditions, exists. Therefore, in the public interest, the necessity for legislative intervention by the enactment of the provisions hereinafter prescribed, and their application until July first, nineteen hundred thirty-four, is hereby declared as a matter of legislative determination.

"§2. The civil practice act is hereby amended by inserting therein two new sections, to be sections ten hundred and eighty-three-a and ten hundred and eighty-three-b, as follows:

"1083-a. LIMITATION UPON DEFICIENCY JUDGMENTS DURING EMERGENCY PERIOD. No judgment shall be granted for any residue of the debt remaining unsatisfied as prescribed by the preceding section where the mortgaged property shall be sold during the emergency, except as herein provided. Simultaneously with the making of a motion for an order confirming the sale or in any event within ninety days after the date of the sale, the party to whom such residue shall be owing may make a motion in the action for leave to enter a deficiency judgment upon notice to the party against whom such judgment is sought or the attorney who shall have ap-

peared for such party in such action. Such notice shall be served personally or in such other manner as the court may direct. Upon such motion the court, whether or not the respondent appears, shall determine, upon affidavit or otherwise as it shall direct, the fair and reasonable market value of the mortgaged premises as of the date of sale or such nearest earlier date as there shall have been any market value thereof and shall make an order directing the entry of a deficiency judgment. Such deficiency judgment shall be for an amount equal to the sum of the amount owing by the party liable as determined by the judgment with interest, plus the amount owing on all prior liens and encumbrances with interest, plus costs and disbursements of the action including the referee's fee and disbursements, less the market value as determined by the court or the sale price of the property whichever shall be the higher. If no motion for a deficiency judgment shall be made as herein prescribed the proceeds of the sale regardless of amount shall be deemed to be in full satisfaction of the mortgage debt and no right to recover any deficiency in any action or proceeding shall exist.

“§1083-b. Judgments in actions on bonds. In any action pending at the time this section as hereby added takes effect, or hereafter commenced during the emergency, other than an action to foreclose a mortgage, to recover a judgment for any indebtedness secured by a mortgage on real property and which originated simultaneously with such mortgage and which is secured solely by such mortgage, against any person or corporation directly or indirectly or contingently liable therefor, any party against whom a money judgment is demanded, shall be entitled to set off the fair and reasonable market value of the mortgaged property less the amounts owing on prior liens and encumbrances. In any action to foreclose the mortgage commenced after the emergency as defined by the law shall have expired, a deficiency judgment may be recovered as though this section had not been enacted but the amount of any money judgment recovered as provided in this section shall be deducted in computing such deficiency judgment.

"3. If any section, part or provision of this act shall be declared unconstitutional or invalid or ineffective by any court of competent jurisdiction, such declaration shall be limited to the section, part or provision directly involved in the controversy in which such declaration was made and shall not affect any other section, provision or part hereof.

"4. The period of the emergency hereby declared shall be from the date this act takes effect until July first, nineteen hundred thirty-four. This act shall not apply to mortgages dated on or after July first, nineteen hundred thirty-two, or to any bond, collateral bond, guarantee, or extension agreement or other agreement or writing concerning or delivered in connection with any indebtedness secured by a mortgage dated on or after July first, nineteen hundred thirty-two."